IN THE

Supreme Court of the United States

OCTOBER TERM 1987

No. 87-2123

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, an agency of the State of Florida, *Petitioner,*

v.

MID-FLORIDA GROWERS, INC. and HIMROD & HIMROD CITRUS NURSERY, *Respondents.*

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The Petitioner Department of Agriculture and Consumer Services, an agency of the State of Florida, respectfully submits this Reply to the issues first raised in the Respondents' Brief in Opposition to Petition for Certiorari.

a. *The Destruction of Exposed Citrus Plants Was Justified As A Reasonable Valid Exercise Of The Police Power To Control A Public Nuisance.*

Respondents have contended throughout this case that they need not prove the emergency citrus canker regulations were unreasonable.[1] In following this assumption the Supreme Court of Florida did not consider the propriety of the emergency rules

[1] During the trial, Respondents' counsel stated "We are not trying the regulatory program. . . . We're not attacking their ability to take emergency action. That's up to them and that's fine. The question is did the trees have value on the date of the taking. And that's the only issue we're dealing with in this case." (Transcript of Trial, p.124).

which defined the trees as suspect and subject to destruction and stated "we do not disagree with the Department's contention that the State's order was a valid exercise of police power." Rather, the Court simply held that a valid exercise of the police power may still result in a taking, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 482 U.S. ____, 96 L.Ed.2d 250 (1987). In continuing to compound this error, Respondents have, in their statement of the question presented, asserted that compensation is required since their citrus plants were "healthy and harmless" and posed "no imminent danger ... to warrant destruction". As a result, the Brief in Opposition is not responsive to the central constitutional issue presented by Petitioner — under what circumstances may Petitioner's valid exercise of police power, under its regulations to control the spread of a public nuisance, result in an unconstitutional taking for which just compensation is required.

Petitioner has asked this Court to clarify its takings jurisprudence as it relates to the enforcement of safety regulations. This Court indicated in *Keystone Bituminous Coal Association v. DeBenedictis,* 480 U.S. ____, 94 L.Ed. 472, 492 at n.22 (1987) that the initial question in applying the nuisance exception is whether the states' action was justified:

> "the issue of compensation cannot arise until the question of justification has been disposed of. In the typical nuisance prevention case, the question is resolved against the claimant." [quoting, R. Epstein, Takings, at 199].

The opinion of the Florida Supreme Court and Respondents' Brief in Opposition is founded on the improper assumption that the question of justification may be determined in "hindsight". As explained in the dissent of Chief Justice McDonald, the question of justification should be whether the government acted reasonably in response to a perceived emergency:

> The department had the duty to take emergency measures to prevent an immediate harm - the spread

> of canker. In viewing its actions from an emergency standpoint, those actions were not unreasonable. The trial judge appeared to base his judgment of inverse condemnation solely on the basis that healthy trees were taken. The issue is not whether the plaintiffs' trees were actually healthy, but rather whether the government, acting responsibly, had reasons to conclude that they might not have been and that it was necessary to destroy them to prevent the spread of a deadly disease. Viewed in this light, the evidence fails to support a claim for inverse condemnation. 521 So.2d at 106.

Thus, Respondents in their Brief in Opposition have attempted to avoid this issue altogether by adopting the major premise that the destruction of the trees were not necessary. This assumption is clearly inappropriate where it presupposes that the issue of justification may be exclusively decided in judicial hindsight.

b) *The Decision Below Presents A Case Or Controversy For This Court.*

The burden of demonstrating mootness is a heavy one. *See County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979). This case certainly is not moot. After the Florida Supreme Court affirmed the order of liability for taking, this case was tried on the damages issue and a final judgment was entered, however, that judgment has not been paid and further proceedings to review the amount of damages awarded are pending in the Second District Court of Appeal of Florida. The Petitioner has an automatic stay of the judgment pending such review.[2] Should a further stay become necessary to preserve this Court's jurisdiction in these certiorari proceedings, the Petitioner will seek and obtain such a stay.

The Respondents suggest that a reversal by this Court of the Florida Supreme Court's finding of liability for a taking would not affect the final judgment on damages because the

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[2] The Florida Rules of Appellate Procedure, Rule 9.310(b)(2), state: "The timely filing of a notice [of appeal] shall automatically operate as a stay pending review, . . . when the State, any public officer in an official capacity, board, commission, or other public body seeks review . . .".

Respondents "have already prevailed at trial on non-federal grounds." (Brief in Opposition, page 7). The flaw in this argument, of course, is that the damages judgment is predicated upon the decision below, i.e., that Petitioner is liable for an unconstitutional taking. The subsequent trial was not on the merits of the Respondents' takings claim, but on the issue of compensation alone.[3] The Respondents thus erroneously conclude that their "right to compensation has already been decided solely upon state law" (Brief in Opposition, page 8), and that they have "already established and won their claim under the state constitution" (Brief in Opposition, page 9), because the compensation issue was tried solely on state law.

If this Court reverses the holding that a taking occurred in this case, the final judgment predicated on the order of taking and the subsequent trial on damages will be nullified. Rather than establish mootness, the Respondents' argument demonstrates that the federal issue presented in this case is final for purposes of 28 U.S.C. Section 1257 under the rule stated in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975). Reversal of the Florida Supreme Court's finding of liability for a taking would preclude further litigation on the question whether the Fifth and Fourteenth Amendments of the U.S. Constitution require just compensation in this case. Respondents' argument therefore merely affirms Petitioner's contention that the remaining litigation does not raise other federal questions which might be brought to the Court in later proceedings for review, and that the federal issue, finally decided by the highest court of the State of Florida, will survive and require a decision regardless of the outcome of further proceedings. This satisfies the first and second categories of finality outlined in *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 479-80.

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[3] The subsequent trial admittedly raised only state law issues since Florida courts apply the same rules to both eminent domain and inverse condemnation proceedings in awarding damages. *See County of Volusia v. Pickens,* 439 So.2d 276 (Fla. 5th DCA 1983). Logic and reason is deemed to compel equal treatment. *Id.* at 277. Chapter 73, Florida Statutes, establishes the elements of compensation awardable in eminent domain proceedings, and Petitioner and Respondents have agreed that these standards are more liberal than federal compensation standards.

Similarly flawed is Respondents' argument that "[i]f a dispositive federal issue had existed [in this case], the opportunity to present it for review in this Court has passed." (Brief in Opposition, page 13 at n.6). It is difficult to conceive when Petitioner may have had a prior opportunity to present this case for review in this Court, and how this Court's jurisdiction over the dispositive federal issue could have been thwarted by the Respondents' manipulation of interim events. Indeed, this Court has shown a willingness to review a federal issue which has been finally decided but may become mooted by subsequent circumstances. *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 481.

While clothing this argument in the doctrine of mootness, the Respondents' true focus appears to be on the alleged absence of a federal question since, they contend, their rights were established based solely on the Florida Constitution. As summarized in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.,* 467 U.S. 138 (1984), this Court "retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." Because the Florida Supreme Court erred in understanding cases of this Court and provisions of the United States Constitution, this Court should so declare and leave the state court to decide the issue solely as a matter of state law. *See Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 568 (1977). Since the Florida court's decision is inextricably interwoven with federal law, and there is no "plain statement" enunciating a separate state ground for decision, this Court must presume that the Florida Supreme Court decided this case the way it did because of its misapprehension of federal constitutional law. *Michigan*

v. Long, 463 U.S. 1032 (1983).[4] This Court is not prohibited by the case or controversy requirement of Article III from vacating the judgment of the state court and remanding the case so that the state court may reconsider the state law question free from misapprehension about the scope of federal law. *See Three Affiliated Tribes, supra.*

The takings issue clearly was not determined solely on the Florida Constitution or on other state law grounds. The opinion of the Supreme Court of Florida relies upon three decisions of this Court construing the Fifth Amendment takings clause.[5] Each of the four Florida cases cited also rely upon federal constitutional grounds. The two cases Respondents refer to as "freestanding authority" to show an independent state ground for a decision, likewise rely upon the U.S. Constitution and this Court's construction of federal constitutional law in reaching their decisions.[6] The decision of the Supreme Court of Florida itself men-

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[4] In applying the presumption of *Michigan v. Long*, this Court has never required that the federal cases cited in a state supreme court opinion be "freestanding authority" and has found a state supreme court to be interwoven with federal law when the opinion "makes use of both" federal and other opinions from that state "in its analysis, generally citing both for the same proposition." *See New York v. Class*, 475 U.S. 106, 109 (1986). *See, also, Delaware v. Van Arsdall*, 475 U.S. 673, 678, n.3 (1986). Inasmuch as the Florida Supreme Court gives no indication that Respondents' rights under Article X, Section 6 were distinct from, or broader than Respondents' right under the Fifth Amendment, it may be presumed under *Michigan v. Long* that this opinion is interwoven with federal law. *See Kentucky v. Stincer*, 482 U.S. ____ 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987), *Maryland v. Garrison*, 480 U.S. ____, 108 S.Ct. 1013, 94 L.Ed.2d 72 (1987).

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[5] Those cases are *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Loretto v. Teleprompter Manhattan CATV Corp., supra;* and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, supra.*

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[6] In *State Plant Board v. Smith*, 110 So.2d 401 (Fla. 1959), the Court specifically cites the Fourteenth Amendment of the U.S. Constitution and relies upon *Mugler v. Kansas*, 123 U.S. 623 (1887), as well as cases from other jurisdictions discussing federal constitutional standards. *Corneal v. State Plant Board*, 95 So.2d 1 (Fla. 1957) is likewise intertwined with the federal constitution. It cites to the Fourteenth Amendment of the U.S. Constitution, and relies on Florida cases decided based on federal constitutional grounds. For example, the *Corneal* decision expressly relies upon *Campoamor v. State Livestock Sanitary Board*, 136 Fla. 451, 182 So. 277 (Fla. 1938), which expressly relies upon *Miller v. Schoene*, 276 U.S. 272 (1928) and treatises on the federal constitution.

tions the Fifth Amendment once and the Florida Constitution only once.[7] The terms "full" and "just" compensation are used indiscriminately, referring respectively to the Florida and Federal Constitutions.

The Supreme Court of Florida "approve[d] the decision of the district court" which even more clearly relied expressly and solely on federal constitutional grounds. The decision of the district court cites the Fifth Amendment of the U.S. Constitution twice, and does not cite to the Florida Constitution at all. It relies upon six cases of this Court including three of the leading cases, *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), *Goldblatt v. Hempstead,* 368 U.S. 590 (1962) and *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978), construing the Fifth and Fourteenth Amendments. The Florida cases cited in the district court's opinion are also directly traceable to this Court's leading decisions on Fifth Amendment takings law.[8]

The Respondents' own Brief submitted to the Florida Supreme Court clearly reveals that Respondents were seeking to establish their taking claim under the Fifth and Fourteenth Amendments of the United States Constitution. To illustrate this fact, Petitioner has included in the Appendix to this Reply the first two pages of the "Argument" section of Respondents' Brief to the Supreme Court of Florida. Repeated reference is made to the Fifth Amendment, but nowhere in the Brief is the Florida Constitution even cited as a ground for a decision.

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[7] 521 So.2d at 103.

[8] *Albrecht v. State,* 444 So.2d 8 (Fla. 1984) and *Graham v. Estuary Properties, Inc.,* 399 So.2d 1374 (Fla.), cert. denied, sub nom. *Taylor v. Graham,* 454 U.S. 1083 (1981), were decided on the express authority of *Pennsylvania Coal v. Mahon, supra; State Plant Board v. Smith, supra,* as shown above, relies upon *Mugler v. Kansas, supra.* Two other cases cited in the opinion, *Pinellas County v. Brown,* 450 So.2d 240 (Fla. 2nd DCA 1984) and *Pinellas County v. Brown,* 420 So.2d 308 (Fla. 2nd DCA 1982) rely on *Graham v. Estuary Properties, supra* which, as shown above, relies directly on *Pennsylvania Coal v. Mahon, supra.*

CONCLUSION

The Respondents' Brief in Opposition contains many incorrect statements of federal law and false descriptions of the facts and record in this case. Only full briefs on the merits of this case can adequately address those factual and legal issues.

This case presents a dilemma which only this Court can resolve. Only this Court can bind the Florida court and all other courts in interpretations of federal constitutional law. The importance of this case has been demonstrated by the many parties appearing as amici curiae and by the U.S. Attorney General's issuance of Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, referred to in the Amici Briefs. The Solicitor General should be invited to make an appearance to address the position of the United States, particularly on behalf of the USDA and of other federal agencies administering health and safety regulations.

This Court should find that it has jurisdiction in this case and allow the parties to submit briefs on the merits of this most important issue.

Respectfully submitted,

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APPENDIX

EXCERPT FROM RESPONDENTS' BRIEF BEFORE SUPREME COURT OF FLORIDA

ISSUE FOR REVIEW

WHETHER THE STATE MUST CONSTITUTIONALLY PAY JUST COMPENSATION FOR SUMMARY DESTRUCTION OF SUSPECT CITRUS PLANTS LATER SHOWN TO BE HEALTHY?

ARGUMENT

The Department contends that valid exercise of its police power precludes an inverse taking. This is not the law as the Second District opinion thoroughly explains. Moreover, the Supreme Court of the United States in Case No. 85-1199, *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* just decided on June 9, 1987, _____ U.S. _____, _____ S.Ct. _____ at Slip Op. at p.9, reiterates:

> "The basic understanding of the (fifth) Amendment makes clear that it is designed not to limit the governmental interference with property rights per se but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation."

See also *Loretto v. Teleprompter Manhattan T.V. Corp.,* 458 U.S. 415, 425, 102 S.Ct. 3164, 3170 (1982) (a taking may occur and suit for inverse condemnation proceed even if governmental action depriving Plaintiff of property was a valid exercise of police power); *San Diego Gas & Elec. Co. v. San Diego,* 450 U.S. 621, 648-49, 101 S.Ct. 1087 (1981) (dissenting Op. of J. Brennan.[2]

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[2] Justice Brennan's dissenting opinion to the Court's refusal to accept jurisdiction in *San Diego Gas* was cited with approval by the majority opinion in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, supra,* Slip Op. at pp. 10 & 11.

> "[I]n *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 8 L.Ed.2d 130, 82 S.Ct. 987 (1961),. . .the Court cautioned: 'That is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation.' Id., at 594, 8 L.Ed.2d 130, 82 S.Ct. 987. On many other occasions, the Court has recognized in passing the vitality of the general principle that a regulation can effect a Fifth Amendment "taking." See, e.g., *Prune Yard Shopping Center v. Robins,* 447 U.S. 74, 83, 64 L.Ed.2d 741, 100 S.Ct. 2035 (1980); *Kaiser Aetna v. United States,* 444 U.S. 164, [450 U.S. 6491] 174, 62 L.Ed.2d 332, 100 S.Ct. 383 (1979); *Andrus v. Allard,* 444 U.S. 51, 65-66, 62 L.Ed.2d 210, 100 S.Ct. 318 (1979); *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168 2 L.Ed.2d 1228, 78 S.Ct. 1097 (1958).

See also *Albrecht v. State,* 444 So.2d 8, 12 (Fla. 1984) (settled proposition that a regulation may meet standards necessary for the exercise of the police power but still result in a taking).